Supreme Court, U.S.
FILED

97 • 320 AUG 20 1997

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

RUBEN GALLEGOS,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GILBERT H. LEVY
Counsel of Record
200 Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670

Attorney for Petitioner

August 20, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52 pp

QUESTION PRESENTED

Whether the rule applied by the Fifth Circuit in deciding that Petitioner did not suffer prejudice as a result of a variance between the single conspiracy charged in the indictment and the multiple conspiracies proved at trial conflicts with this court's decision in *Kotteakos v. United States*, 328 U.S. 748, 90 L. Ed. 1945, 66 S. Ct. 1239 (1945).

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Ruben Gallegos, the United States of America, and the following parties, who are respondents pursuant to Supreme Court Rule 12(6), and were co-defendants of the Petitioner in the United States District Court, and co-appellants in the United States Court of Appeals for the Fifth Circuit: Arturo Pena-Rodriguez, Lloyd Maestas, Bob Alan Dickinson, Leonard Gene Lied, Avelino Gil-Terrazas, William Hobart Russel, and Max Gene Wallace.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINION BELOW 1

BASIS OF THIS COURT'S JURISDICTION 1

STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

Procedural History 2

Statement of Facts 3

ARGUMENT 7

This Court Should Accept Review Because The Fifth Circuit Has Decided An Important Federal Question in a Manner That Conflicts With a Prior Decision of This Court 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Berger v. United States, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935) 10

Kotteakos v. United States, 328 U.S. 748, 90 L. Ed. 1945, 66 S. Ct. 1239 (1945) 7, 8, 9, 10, 12, 13

United States v. Bertolotti, 529 F.2d 149 (2nd Cir. 1975) 12

United States v. Faulkner, 17 F.3d 745 (5th Cir. 1994) ...8, 9

United States v. Morris, 46 F.3d 410 (5th Cir. 1995) 7

United States v. Pena-Rodriguez, 110 F.3d 1120 (5th Cir. 1997) 1, 7, 9

United States v. Pettigrew, 77 F.3d 1500 (5th Cir. 1996) 9

United States v. Rosnow, 977 F.2d 399 (8th Cir. 1992) 12

STATUTES

Federal Criminal Rule 14 1

Federal Criminal Rule 52(a) 1

Supreme Court Rule 10(a) and (c) 1, 12

Title 18 United States Code § 1956(g) 2

Title 21 United States Code § 841(a)(1) 1, 2

Title 21 United States Code § 846 .....1, 2

Title 28 United States Code § 1254(1) 1

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in *United States. v. Pena-Rodriguez*, 110 F. 3d 1120 (5th Cir. 1997).

BASIS OF THIS COURT'S JURISDICTION

The Court of Appeals decision affirming the conviction was entered on April 10, 1997. Petitioner's suggestion for Rehearing *En Banc*, (treated by the Court of Appeals as a petition for rehearing), was entered on May 22, 1997. This Court has jurisdiction pursuant to Title 28 United States Code § 1254(1).

STATUTES AND RULES INVOLVED

Federal Criminal Rule 52(a) provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

In addition, the following statutes and rules were involved in the decision below from which Petitioner seeks relief:

Title 21 United States Code § 841(a)(1)
Title 21 United States Code § 846
Supreme Court Rule 10(a) and (c)
Federal Criminal Rule 14

These provisions are set forth in full in the Appendix to this Petition.

STATEMENT OF THE CASE

Procedural History

Petitioner was charged by superseding indictment along with thirty-one other defendants in the United States District Court for the Western District of Texas. He was charged in Count One with conspiracy to possess a controlled substance with intent to distribute, pursuant to Title 21 United States Code §§ 841(a)(1) and 846. He was charged in Count Four with possession of cocaine with intent to distribute pursuant to Title 21 United States Code § 841(a)(1). He was charged in Count Eight with money laundering pursuant to Title 18 United States Code § 1956(g).

Prior to trial, Petitioner moved for severance and the motion was denied. Trial by jury commenced on October 17, 1994. At the close of the Government's case, the District Court granted the Petitioner's motion for judgment of acquittal as to Count Eight. Following deliberation, the jury returned a verdict of guilty as to Count One and was unable to reach a verdict as to Count Four. The Government subsequently moved to dismiss Count Four. On February 2, 1995, the District Court entered judgment against the Petitioner and sentenced him to a prison term of one hundred eighty-eight months, to be followed by a five year term of supervised release. Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit.

On April 10, 1997, the Court of Appeals filed and entered its opinion affirming the conviction and sentence. Petitioner filed a timely suggestion for rehearing *En Banc*. On May 22, 1997, the Court of Appeals entered an order

treating the suggestion for rehearing *En Banc* as a petition for rehearing and denying the same.

Statement of Facts

At trial, the Government presented evidence of a large scale drug conspiracy. Thirty-two defendants were named in the superseding indictment. The Government claimed that the conspiracy operated from November, 1986 until February, 1994. The conspiracy purportedly distributed in excess of eight thousand kilograms of marijuana and four thousand kilograms of cocaine. The conspiracy was alleged to have operated in various places including Mexico, El Paso, Los Angeles, San Diego, Northern California, Indianapolis, Oklahoma City, and Florida.

According to the Government's evidence, the leader of the conspiracy was Eduardo Gonzalez Quirarte, a Mexican national who owned property in and around El Paso. Quirarte arranged for the transportation of large quantities of marijuana and cocaine from Mexico. The persons responsible for transporting the drugs from Mexico, under the direction of Quirarte, were Hector Mendoza Garcia and Ruben Chavez Sr. Gonzalez Quirarte was a fugitive from justice at the time of trial.

The other head of the conspiracy on the United States side of the border was Avelino Gil-Terrazas. He was assisted by his common law wife Norma Gil. Gil-Terrazas arranged for the transportation of drugs from the El Paso area to various parts of the United States. The method of transportation favored by the organization consisted of vehicles with false compartments including pickups,

horse trailers and semi-tractors. According to the evidence, other persons assisting Gil-Terrazas were Ruben Chavez Jr., Jose Roberto Cobos, and Ariel Antonio Dominguez.

The Government presented evidence that Gonzalez Quirarte owned the controlling interest in a business known as Truck Center of El Paso, (hereinafter "TCEP"). Petitioner Ruben Gallegos, and his brother, Arcadio "Art" Gallegos, were minority shareholders in that company.

The organization distributed drugs from property located at 10800 Thunder Road, El Paso Texas, which was owned by Gonzalez Quirarte. This property was raided by law enforcement in September 1989. Thereafter, the organization employed other distribution centers including property in Espinola, New Mexico, owned by Lloyd Maestas.

The Government claimed at trial that the conspiracy had three primary areas of distribution. One was El Paso, Texas. Major distributors in the El Paso area were Leonard Lied and later, William Russel, who assumed Lied's role in the organization. Robert Dickinson operated a "stash" house in the El Paso area for the benefit of Lied and Russel. Felipe Madrid was a driver who worked for Lied and Russell and delivered numerous loads of marijuana to Dallas. Madrid owned a company called United Freight Services. Madrid was one of the accomplices who testified for the Government at trial.

Another primary area of distribution was San Diego. The heads of the organization in San Diego were Juan Saenz-Macias and Jose Luis Gomez. Randall Bowers was a driver who worked for Saenz-Macias. Bowers picked up

drugs from Gil-Terrazas and delivered them to Saenz-Macias. He also transported drugs to Oakland, Indianapolis, and Oklahoma City. He also had his own drug distribution business, operating from his ranch in Perris, California. Bowers was arrested for transportation of cocaine, convicted, and sentenced to a term of fourteen years. In order to a secure a reduction of his sentence, he testified against Petitioner and other persons named in the superseding indictment.

Another primary area of distribution was Los Angeles. The heads of the organization in Los Angeles were Juan Carlos Munoz-Quesada and Manual De Jesus Galvez. Other members of the organization in Los Angeles were Roberto Rangel-Arreola, Jose Luis Castillo, Enrique Anguiano, Salvador Vargas and Saul Veliz-Vargas. Munoz-Quesada arranged for the transportation of marijuana to Timothy Friedhoff, Stephen Alexander and Henry Dubrovsky in Florida.

Another, smaller distribution group operated in Oklahoma City. Max Wallace and Art Pena-Rodriguez received drugs from Lloyd Maestas. Alex Gomez and Mario Aguinaga were drivers for Maestas and Wallace.

The evidence against Petitioner consisted mainly of the accomplice testimony of Randall Bowers and Felipe Madrid. Bowers testified that in March, 1991, he delivered modified fuel tanks to Ruben Gallegos.[1] Petitioner

---

[1] Initially, when he was asked to identify Petitioner at trial, Bower pointed to Petitioner's brother, Art Gallegos. Later, after a recess, Bowers identified Petitioner as someone he had met on a previous occasion.

complained to Bowers that tanks delivered on a previous occasion were of poor quality and had leaked. Bowers testified that he picked up two hundred fifty kilos of cocaine from a ranch belonging to Gil-Terrazas a couple of days prior to his arrest. Bowers testified that while he was waiting to pick up the load, Petitioner entered Avelino Gil's house and said that the load was ready. Felipe Madrid testified that on several occasions he made arrangements on the telephone to transport loads of marijuana, either with Gonzalez Quirarte or with Petitioner. Madrid testified that on one occasion, Petitioner was present when he transferred a suitcase containing $700,000.00 in cash to Quirarte.[2] The Government presented documentary evidence indicating that several of the vehicles that the organization used to transport marijuana had been sold by Petitioner. The semi-tractor containing four hundred seventy-six pounds of cocaine that Bowers was driving at the time of his arrest was sold by Petitioner. Government agents discovered two trailers with false bottoms at TCEP.

Petitioner did not take the stand, but his brother, Arcadio, testified that TCEP was a legitimate business, and neither he nor Petitioner were involved in illegal activity. A key government witness conceded that there was no indication that TCEP was a "front" for drug dealing. A number of defense witnesses testified that TCEP was actively engaged in buying and selling tractor

---

[2] Madrid never indicated that Petitioner saw the contents of the suitcase and this testimony was the basis of the money laundering count that was dismissed at the close of the Government's case.

trailers. Other defense witnesses testified that they visited the business on numerous occasions and saw no evidence that TCEP was involved in the distribution of controlled substances.

ARGUMENT

This Court Should Accept Review Because The Fifth Circuit Has Decided An Important Federal Question in a Manner That Conflicts With a Prior Decision of This Court.

On appeal, Petitioner and others claimed error in that the indictment alleged a single conspiracy, but the evidence at trial established the existence of two or more conspiracies. *United States v. Pena-Rodriguez*, 110 F.3d at 1126. They "claimed that they were prejudiced by the transferrence of guilt created by voluminous evidence of illegal activity implicating unrelated defendants with whom they were tried". *Id.* Citing *Kotteakos v. United States*, 328 U.S. 750, 775, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946), they claimed that the prosecution violated "their right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others".

In approaching this issue, the Court of Appeals followed the analysis set forth in *United States v. Morris*, 46 F.3d 410 (5th Cir. 1995), which is to first decide whether there is a variance between the conspiracy charged in the indictment and those proved at trial, and next determine whether the substantial rights of the parties have been violated. 110 F.3d at 1126. The Court in *Morris* stated that the principal considerations in counting conspiracies are:

(1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlapping of participants in various dealings. 46 F.3d at 415. The Court of Appeals noted in this case there were strong indications of a variance because although Gonzalez Quirarte and Gil-Terrazas were leaders of an organization and sources of supply for other groups, " the evidence does not establish any interdependence between Gonzalez's and Gil's various distributors".[3] 110 F.3d 1127. The Court of appeals held however that it was unnecessary to determine the existence of a variance because appellants failed to show that any variance existed that affected their substantial rights. *Id.* In determining whether the substantial rights of the Appellants had been violated, the Court of Appeals cited its earlier decision in *United States v. Faulkner*, 17 F.3d 745, 762 (5th Cir. 1994), and noted that:

> . . . this Court has long held that when the indictment alleges the conspiracy count as a single conspiracy, but the government proves multiple conspiracies, and a defendant's involvement in at least one of them, then clearly there is no variance affecting the defendant's substantial rights.

110 F.2d 1128.

---

[3] This is analogous to the situation in *Kotteakos*, a "wheel" conspiracy, wherein a single individual, Simon Brown, assisted numerous others in submitting fraudulent loan applications to the Government. A variance was found to exist in that case because there was no connection between the various loan applicant defendants and hence the "spokes" of the wheel were unconnected. 323 U.S. 753-756.

The Court of Appeals recognized however that, "such an absolute rule would be hard to square with *Kotteakos*", and it therefore applied the more general test, also suggested by *Faulkner*, that a defendant's substantial rights are affected only if he or she, "can establish reversible error under general principles of joinder and severance". *Id.* The Fifth Circuit rule for obtaining relief from prejudicial joinder places an almost insurmountable burden on the party seeking a severance. Denial of a motion for severance is reviewed only for an abuse of discretion. *United States v. Pettigrew*, 77 F.3d 1500, 1517 (5th Cir. 1996).[4] To demonstrate prejudice, defendant bears the burden of showing specific and compelling prejudice that resulted from an unfair trial and such prejudice must be of the type against which the trial court cannot afford protection. *Id.* Quantitative disparity in the evidence is insufficient to justify a severance and the "mere presence of spillover prejudice" ordinarily does not justify a severance, particularly where defendants are convicted of participating in the same conspiracy. *Id.*

Applying this rule to the facts of this case, the Court of Appeals held that Appellants failed to show that their substantial rights had been violated because there was sufficient evidence to establish that each one of them participated in at least one conspiracy, the District Court gave a multiple conspiracy instruction, the jury demonstrated a degree of discretion in being unable to reach a

---

[4] The Court in *Pettigrew* quoted extensively from the decision in *United States v. Faulkner*, 17 F.3d 1745 (5th Cir. 1994), which was also cited as the basis of the decision in this case. *United States v. Pena Rodriguez*, 110 F.3d 1128.

verdict on two of the counts, and finally, the evidence was not "particularly complex". 110 F.3d 1128, 1129. In taking this approach, the Court of Appeals completely ignored the confusing, convoluted nature of the evidence in this case, not to mention the number of conspiracies proved at trial, the number of defendants charged, and the enormous quantity of evidence that came in because it was admissible against some but not all of the defendants.[5] In taking this approach, and in completely ignoring the potential prejudice from "spillover evidence", the Fifth Circuit departed substantially from the holding of this Court in *Kotteakos v. United States, supra.*

In *Kotteakos,* this Court followed the analysis previously adopted in *Berger v. United States,* 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935), which is to determine whether or not the variance between the single conspiracy charged in the indictment and the multiple conspiracies proved at trial violated the defendants' substantial rights.[6] In finding that Petitioners in *Kotteakos* suffered prejudice sufficient to merit reversal, this Court distinguished the situation in *Berger,* which involved only two conspiracies and several defendants. Writing for the Court in *Kotteakos,* Justice Rutledge stated:

> On the face of things it is one thing to hold harmless the admission of evidence which took

---

[5] Only a small fraction of the evidence admitted at trial had anything to do with Petitioner Ruben Gallegos and there was no indication that he was associated in any way with the Los Angeles conspiracy, or the Oklahoma City conspiracy.

[6] This approach is incorporated in Federal Criminal Rule 52(a).

> place in the Berger Case, where only two conspiracies involving four persons all told were proved, and an entirely different thing to apply the same rule where, as here, only one conspiracy was charged, but eight separate ones were proved, involving at the outset thirty-two defendants. The essential difference is not overcome by the fact that the thirty-two were reduced, by severance, dismissal or pleas of guilty to nineteen when the trial began and to thirteen by the time the cases went to the jury. *The sheer difference in numbers, both of defendants and conspiracies proven, distinguishes the situation.*

328 U.S. at 766, (emphasis supplied).

At a later point in the decision, Justice Rutledge stated:

> Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.

328 U.S. 772.

Justice Rutledge went on to conclude:

> The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one can really say prejudice to a substantial right has not taken place. Section 269 had no purpose to go so far. *The line must be drawn somewhere. Whether or not Berger marks the limit for this sort of error, we are clear that it must lie somewhere between that case and this one.*

328 U.S. 774, (emphasis supplied).

Thus in *Kotteakos* it was simply the danger of "spill-over" and the potential for confusion resulting from a large number of defendants involved in several different conspiracies, that formed the basis of this Court's finding of prejudice. The number of conspiracies, the number of defendants, and the length and complexity of the trial, were also found to be the basis for findings of prejudice in *United States v. Bertolotti*, 529 F.2d 149, 154-157 (2nd Cir. 1975), and in *United States v. Rosnow*, 977 F.2d 399 (8th Cir. 1992). To the extent that there is a divergence between the views of the Eighth Circuit, the Second Circuit, and the Fifth Circuit on what constitutes sufficient prejudice, that is a consideration which favors granting the writ. *See*, Supreme Court Rule 10(a).

It is difficult to imagine a more confusing situation than that described by the evidence in this case. The testimony at trial suggested the existence of four or five different conspiracies whose only possible connection was a common source of supply. There were thirty-two defendants named in the superceding indictment and an even greater number of unindicted co-conspirators. The fact that jurors were unable to reach a verdict on two of the substantive counts hardly inspires confidence that they were successful in segregating the evidence as to each defendant. The sheer quantity of controlled substances described in the testimony establishes the existence of prejudice since most of this evidence would not have come in against the Petitioner and his co-defendants

if they had been tried separately or charged in separate counts.[7]

The Fifth Circuit completely ignored this potential for prejudice and confusion, and ignored this Court's decision in *Kotteakos*. The Court of Appeals has so substantially departed from a prior decision of this Court as to justify issuance of the writ. *See*, Supreme Court Rule 10(c).

CONCLUSION

This Court should grant the Writ to review the decision of the United States Court of Appeals.

Respectfully submitted,

GILBERT H. LEVY
Counsel of Record
200 Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670

Attorney for Petitioner

[7] If the counts were separate, the District Court could at least have given appropriate limiting instructions.

CONTENTS OF APPENDIX

Page

United States v. Pena-Rodriguez, 110 F.3d 1120 (5th Cir. 1997) .....App. 1

Petition for Rehearing .....App. 27

Title 21 United States Code § 841(a)(1).....App. 29

Title 21 United States Code § 846.....App. 30

Supreme Court Rule 10(a) and (c).....App. 31

Federal Criminal Rule 14 .....App. 32

Jury Instruction: Multiple Conspiracies.....App. 33

UNITED STATES of America,
Plaintiff-Appellee,

v.

Arturo PENA-RODRIGUEZ, Maxwell Gene Wallace, Lloyd Maestas, Bob Alan Dickinson, a/k/a "Fred", a/k/a Robert Alan Dickinson, Leonard Gene Lied, Avelino Gil-Terrazas, Ruben Gallegos, Hector Mendoza-Garcia, and William Hobert Russell, a/k/a "El Indio", a/k/a William Hobart Russell, Defendants-Appellants.

No. 95-50077.

United States Court of Appeals,
Fifth Circuit.

April 10, 1997.

Defendants were convicted in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, Chief Judge, of conspiracy to possess with intent to distribute marijuana and cocaine, and two defendants were also convicted of conspiracy to launder money. Defendants appealed. The Court of Appeals, Benavides, Circuit Judge, held that: (1) evidence was sufficient to support convictions; (2) even if indictment alleging single conspiracy to distribute cocaine and marijuana varied from proof at trial, allegedly showing two conspiracies, variance did not affect defendants' substantial rights, and was not fatal; and (3) good faith exception to exclusionary rule applied to search conducted pursuant to warrant allegedly containing stale information.

Affirmed.

Appeals from the United States District Court for the Western District of Texas.

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

This case involves an appeal by eight appellants from convictions for various narcotics offenses related to their roles in an international narcotics-distribution organization. The superseding grand jury indictment charged thirty-two defendants with eight counts and resulted in a three-week trial involving eighteen defendants. At trial, the government called over 100 witnesses and entered more than 800 exhibits into evidence. Each of the appellants was convicted on the first count of the indictment, which alleged a conspiracy to possess with the intent to distribute marijuana and cocaine in violation of 21 U.S.C. §§ 841(a)(1) & 846. In addition, appellants William Hobart Russell and Leonard Gene Lied were convicted of count eight of the indictment, which alleged a conspiracy to launder money in violation of 18 U.S.C. § 1956(a)(1)(A)(I).

The convictions at issue were the result of an investigation by law enforcement agencies that established the existence of a large-scale drug conspiracy. The leaders of the organization were Eduardo Gonzalez-Quirarte ("Gonzalez") and Avelino Gil-Terrazas ("Gil"). The organization imported marijuana and cocaine into El Paso, Texas, and distributed the narcotics to various states throughout the country, including California, Oklahoma,

Indiana, Florida, Colorado, and New Mexico. The organization transported its contraband in pickup trucks, horse trailers, and semi-tractors that contained hidden compartments.

Appellants contest their convictions on various grounds. In addition, a number of the appellants challenge the district court's calculation of their sentences under the applicable Sentencing Guidelines. For the reasons that follow, we AFFIRM the judgment of the district court in all respects.

I. Sufficiency of the Evidence

Appellants Leonard Gene Lied, William Hobart Russell, Bob Alan Dickinson, Ruben Gallegos, Maxwell Gene Wallace, and Arturo Pena-Rodriguez argue that there is insufficient evidence to support their convictions for conspiring to possess marijuana or cocaine with the intent to distribute under count one. In addition, Lied and Russell contend that the evidence was insufficient to support their convictions under count eight for conspiring to launder money. In conducting a sufficiency review, we must view the evidence and the inferences therefrom in the light most favorable to the jury's verdict and determine whether "a rational trier of fact could have found these defendants guilty beyond a reasonable doubt." *United States v. Velgar-Vivero*, 8 F.3d 236, 239 (5th Cir.1993), *cert. denied*, 511 U.S. 1096, 114 S.Ct. 1865, 128 L.Ed.2d 486 (1994).

The elements of a drug conspiracy are: "(1) the existence of an agreement between two or more persons to violate narcotics law; (2) the defendant's knowledge of

the agreement; and (3) the defendant's voluntary participation in the agreement." *United States v. Gonzalez*, 76 F.3d 1339, 1346 (5th Cir.1996). Similarly, a conspiracy to launder money under § 1956(a)(1)(A)(I) requires proof that "(1) there is a conspiratorial agreement, (2) one conspirator knowingly commits an overt act by participating in a financial transaction, (3) the financial transaction involves the proceeds of an unlawful activity, (4) the conspirator participating in the transaction had the intent to promote or further that unlawful activity, and (5) the transaction affected interstate or foreign commerce." *United States v. Fierro*, 38 F.3d 761, 768 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1431, 131 L.Ed.2d 312 (1995).

This court has recognized that "[a] jury may infer the elements of a conspiracy conviction from circumstantial evidence. . . . " *United States v. Leal*, 74 F.3d 600, 606 (5th Cir.1996). We have also held that "a guilty verdict may be sustained if supported only by the uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain or promise of leniency, unless the testimony is incredible or insubstantial on its face." *United States v. Bermea*, 30 F.3d 1539, 1552 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1825, 131 L.Ed.2d 746 (1995). "Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature." *Id.*

With these principles in mind, we find that the following evidence presented by the government was sufficient to sustain each of the convictions against the appellants.

A. The Dallas Appellants

The evidence against Lied, Russell, and Dickinson (collectively "the Dallas Appellants") consisted primarily of the testimony of Felipe Madrid, Jr., a co-conspirator, governmental informant, and owner of United Freight Service ("UFS"), the corporation through which the Dallas Appellants conducted their drug-trafficking activities. Madrid testified that in the summer of 1990 he met with Gonzalez, Gil, and Lied to plan what they were going to do with "the proceeds of marijuana." According to Madrid, he served as an interpreter and middle man for the drug organization, wherein Gonzalez was the supplier and Lied was Gonzalez's original distributor in the Dallas area. Madrid testified that this organization began operating in the fall of 1990.

Madrid described the organization's standard procedure for handling a load of marijuana. The process began when Gonzalez arranged for Madrid to pick up marijuana from various locations in El Paso with his van. Madrid then took the marijuana to a "stash house" located on Dale Douglas Street in El Paso where it was weighed and repackaged in small boxes. The small boxes of marijuana were then placed in the van and transported to a warehouse on Rojas Street in El Paso. At the warehouse, Madrid placed the small boxes of marijuana inside larger boxes, filled the larger boxes with Styrofoam, and loaded an 18-wheeler with the larger boxes. Madrid then drove the 18-wheeler to one of two warehouses rented by the organization in the Dallas area.

More specifically, Madrid testified that on one occasion Gil gave him a three- to five-pound sample of marijuana that he took to Lied.[1] Madrid also testified that it was standard procedure for him to give a copy of the recorded weights of shipments of marijuana to Lied. Those weights were used to determine how much the particular load of marijuana was worth. In addition, the weights were relevant because Lied paid Madrid for his work at the rate of $15 per pound of marijuana that he hauled. Madrid testified that he had an ongoing discussion with Lied regarding the delivery of money to Gonzalez for marijuana. On at least a few occasions, Lied gave Madrid drug money that he subsequently delivered to Gonzalez. Moreover, on one occasion in which drug money was transferred, Madrid testified that he, Gonzalez, Gallegos, and Lied were all present. The amounts of these drug payments ranged from $150,000 to $700,000.

Dickinson was the freight manager for UFS. While it is undisputed that Dickinson handled a sizable amount of legitimate cargo hauled by UFS, Madrid testified that Dickinson also participated in the organization's drug-trafficking activities. For example, the organization's stash house on Dale Douglas was rented in Dickinson's name. Moreover, Madrid testified that Dickinson sometimes helped him weigh and repackage the marijuana at the stash house. Finally, Madrid testified that it was "his belief" that on several occasions Dickinson drove trucks

---

[1] Samples are used in the drug trade to demonstrate the general quality of the merchandise, which, in turn, affects the price that the distributor must pay for the goods.

that he knew were full of marijuana and picked up drug money. Finally, Madrid testified that Dickinson sometimes helped him count the money that they received for marijuana.[2] In this regard, in the fall of 1991, Dickinson and Madrid complained to each other about the infrequency and insufficient amounts of Lied's most recent payments.

Madrid testified that on one occasion in late December of 1991, he saw Russell at the organization's warehouse in Forney, Texas. Russell was talking to several of the organization's Dallas-based employees and was aware that Madrid was unloading marijuana. According to Madrid, Russell's appearance at the warehouse coincided with a change in management in the organization whereby Lied broke off his ties to the organization and Russell took over Lied's role as distributor in the Dallas area. Madrid testified that Russell paid him approximately $20,000 or $30,000 for transporting marijuana on one occasion.

Madrid's active participation in the organization involving the Dallas Appellants concluded in April 1992 when he was arrested and later convicted on an unrelated charge. Madrid testified that the organization owed him approximately $250,000 in "back pay" at the time of his arrest. Madrid told his ex-wife, Gloria Stitt, that any money that he was owed would come from Russell and that she could keep whatever she could procure for their children.

---

[2] Dickinson was acquitted of money laundering, however, when the jury failed to reach a verdict on that count. *See* FED. R. CRIM. P. 29.

Stitt, a paid governmental informant, enlisted the aid of her brother, Henry Garcia, to procure some of the money owed Madrid by the organization. Garcia wrote Madrid a letter in which Garcia stated that "El Indio wants me to ask what you want done with your cake. . . . " Madrid testified that "El Indio" was Russell's nickname and that "cake" was code for "money" in the organization. Madrid subsequently sent Stitt to pick up the money from Garcia. Garcia gave Stitt a box containing large denominations of cash totaling $60,000. Stitt turned the box and the money over to the government, and at trial she testified consistently with Madrid about these events.

From such evidence, the jury could rationally have concluded beyond a reasonable doubt that each of the Dallas Appellants knowingly and voluntarily participated in a conspiracy to possess with the intent to distribute marijuana. The foregoing evidence was also sufficient to sustain the convictions of Lied and Russell for engaging in a conspiracy to launder money. Specifically, Madrid testified that he received large sums of drug money from Lied and delivered those proceeds to Gonzalez. Furthermore, significant evidence was presented that Russell transferred $60,000 in drug proceeds to Garcia as "backpay" for the work Madrid had done on behalf of the organization. *See United States v. Flores*, 63 F.3d 1342, 1361 (5th Cir.1995), *cert. denied*, ___ U.S. ___, 117 S.Ct. 87, 136 L.Ed.2d 43 (1996); *United States v. Puig-Infante*, 19 F.3d 929, 937-42 (5th Cir.), *cert. denied*, 513 U.S. 864, 115 S.Ct. 180, 130 L.Ed.2d 115 (1994).

B. The Oklahoma Appellants

The evidence to sustain convictions presented against Appellants Wallace and Pena-Rodriguez (collectively "the Oklahoma Appellants") came primarily from the testimony of two co-conspirators and governmental informants, Clifford W. Mengers and Randall Bowers. Mengers testified that he was a professional truck driver and small-time drug dealer in Oklahoma. On one occasion, Wallace called Mengers and asked for his help in backing up a horse trailer near Wallace's garage. The horse trailer, which Mengers understood had come from El Paso, had Texas license plates and a hidden compartment that contained marijuana. Mengers testified that he observed Wallace and Jose Gomez remove marijuana from the trailer's hidden compartment.[3]

Mengers also testified that Wallace told him on several occasions that Wallace was expecting to receive cocaine from a man named Arthur. Mengers testified that it was his understanding that "Arthur" was Appellant Pena-Rodriguez because Pena-Rodriguez was the only Arthur that Mengers knew. On one occasion, in fact, Mengers found several kilograms of cocaine in the trunk of Wallace's car, which was being stored in Mengers's garage.

---

[3] Evidence that the horse trailer came from El Paso and contained a hidden compartment indicates that this marijuana was part of the larger conspiracy charged in the indictment. Moreover, a variety of evidence in the record ties Jose Gomez, a charged co-conspirator, to other participants in the conspiracy, including Randall Bowers.

Randall Bowers testified that in 1990, Jose Gomez and he drove a horse trailer containing 350 pounds of marijuana to Wallace's house. Bowers noted that both Wallace and Pena-Rodriguez helped Gomez and him unload the trailer. Bowers also testified that he delivered a load of marijuana to Pena-Rodriguez in early 1991. As compensation for his work, Pena-Rodriguez gave Bowers use of a fancy Chevrolet pickup truck known as "the Boss."

The foregoing evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that Wallace and Pena-Rodriguez knowingly and voluntarily participated in a conspiracy to possess with the intent to distribute marijuana and cocaine.

C. Ruben Gallegos

Appellant Gallegos was a part owner of the Truck Center of El Paso along with his brother, Art Gallegos, and Eduardo Gonzalez. According to the government's theory of the case, Gallegos's role in the organization consisted primarily of providing vehicles for the shipment of marijuana and cocaine, as well as constructing false fuel tanks that were used to store contraband during its transportation. Gallegos had the distinction of being the only appellant who was the subject of testimony by both of the government's star witnesses, Felipe Madrid, Jr. and Randall Bowers.

Bowers testified that he transported some false fuel tanks that were constructed in California to El Paso and gave them to Gallegos. When Bowers delivered the tanks, Gallegos told him that some of the other tanks used by

the organization for smuggling had leaks in them. Gallegos knew this to be the case because he had tested the tanks with water and the tanks leaked. Gallegos expressed concern both that diesel fuel was leaking from the tanks onto the pavement and that fuel was entering into the compartment that stored contraband. Despite this quality control concern, Gallegos accepted the tanks from Bowers.

On another occasion, Bowers picked up a load of cocaine from Avelino Gil's house. Bowers met with Avelino and Norma Gil while waiting for his truck to be loaded. During the ensuing discussion, Gallegos entered the room and announced that "it was ready." Bowers testified that he understood this statement to mean that the altered fuel tanks were ready. Bowers also testified that when Gallegos entered, he was covered with "bondo" dust. Other testimony in the record established that bondo was used to seal the false fuel tanks used by the organization after the tanks were filled with contraband.

Madrid testified that on one or two occasions, when Gonzalez was not available, Gallegos coordinated the pick up of a load of marijuana. Moreover, Gallegos was present when Madrid (on Lied's behalf) transferred $700,000 in drug money to Gonzalez, and Gallegos saw the suitcase that contained the money. Finally, on the day that Madrid was arrested, he had a number of calling cards in his possession. The names and numbers on these cards were in code, presumably to protect the subjects' identities. Madrid testified that one of these cards contained the coded names and phone numbers corresponding to Gallegos, Gil, and Gonzalez.

Again, this evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that Gallegos knowingly and voluntarily participated in a conspiracy to possess with the intent to distribute narcotics.

II. Multiple Conspiracies

Appellants Lied, Dickinson, Russell, Wallace, and Gallegos argue that a fatal variance existed between the indictment, which alleged a single conspiracy, and the proof at trial, which established the existence of two or more separate and independent conspiracies. Appellants claim that they were prejudiced by the transference of guilt created by voluminous evidence of illegal activity implicating unrelated defendants with whom they were tried. *See Kotteakos v. United States*, 328 U.S. 750, 774, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946); *United States v. Sutherland*, 656 F.2d 1181, 1196 (5th Cir.1981), *cert. denied*, 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982). In other words, the appellants argue that the prosecution violated "the[ir] right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others." *Kotteakos*, 328 U.S. at 775, 66 S.Ct. at 1253.

To prevail on this claim, the appellants must prove that (1) a variance existed between the indictment and the proof at trial, and (2) the variance affected their substantial rights. *United States v. Morris*, 46 F.3d 410, 414 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2595, 132 L.Ed.2d 842 (1995). "To determine whether a variance existed between the indictment and the proof at trial, the number of conspiracies proved at trial must be counted." *Id.* at

415. Whether the evidence shows one or multiple conspiracies is a question of fact for the jury. *United States v. Guerra-Marez*, 928 F.2d 665, 671 (5th Cir.), *cert. denied*, 502 U.S. 917, 112 S.Ct. 322, 116 L.Ed.2d 263 (1991). "The principal considerations in counting conspiracies are (1) the existence of a common goal, (2) the nature of the scheme, and (3) the overlapping of participants in the various dealings."[4] *Morris*, 46 F.3d at 415. A jury's finding that the government proved a single conspiracy must be affirmed unless the evidence viewed in the light most favorable to the government would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt. *Id.*

Appellants argue that a functional analysis of the proof at trial establishes the existence of at least two separate and independent conspiracies.[5] These conspiracies were purportedly identified and described by the government's two star witnesses, Bowers and Madrid, neither of whom mentioned the other in his testimony. According to the appellants, the following factors indicate that Bowers and Madrid described two separate and

---

[4] This circuit has also looked to a different set of factors to count the number of conspiracies proven at trial. These factors include: "(1) the time period involved, (2) the persons acting as co-conspirators, (3) the statutory offenses charged in the indictment, (4) the nature and scope of the criminal activity, and (5) the places where the events alleged as the conspiracy took place." *United States v. Thomas*, 12 F.3d 1350, 1357 (5th Cir.), *cert. denied*, 511 U.S. 1095, 114 S.Ct. 1861, 128 L.Ed.2d 483 (1994).

[5] *See Morris*, 46 F.3d at 415 & n. 2 (noting that this court has moved away from a structural and formal examination of the criminal enterprise toward a more functional and substantive analysis).

independent conspiracies: (1) the "Bowers conspiracy" distributed both cocaine and marijuana, whereas the "Madrid conspiracy" distributed only marijuana; (2) the Bowers conspiracy packaged its narcotics at "stash houses" located on Thunder Road and Gage Road in El Paso, whereas the Madrid conspiracy packaged its drugs on Dale Douglas and Rojas Streets in El Paso; (3) the Bowers conspiracy transported its drugs in vehicles with false compartments, whereas the Madrid conspiracy transported its vehicles in unaltered vans and semi-trailers; (4) the Bowers conspiracy distributed its drugs to Indiana, New Mexico, Oklahoma, and California, whereas the Madrid conspiracy distributed its drugs to Dallas; and (5) the Bowers conspiracy operated from May 1987 through 1993, whereas the Madrid conspiracy operated only from the summer of 1991 until April 1992. In sum, the appellants argue that the two conspiracies packaged different drugs at different places and distributed them to different locations at different times.

In contrast, the government argues that the proof at trial, viewed in the light most favorable to the verdict, was sufficient for a rational jury to find a single conspiracy beyond a reasonable doubt. The government contends that this court's past application of each of the factors it has deemed relevant to counting conspiracies supports the government's position in this case. First, the government claims that each member of this conspiracy had the common goal of deriving personal gain from the procurement and distribution of controlled substances.[6]

---

[6] *See id.* (noting that this court has defined a common goal so broadly that the requirement may have "become a mere

Second, the government contends that the nature of this conspiracy was such that its success "depended on the continued willingness of each member to perform his function."[7] Finally, the government contends that "[a] single conspiracy exists where a 'key man' is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal."[8] According to the government, Gonzalez and Gil, the organization's alleged kingpins, were the "key men" in this conspiracy.

A thorough review of the record establishes that Gonzalez and Gil were, in fact, the leaders of an organization based in El Paso that was supplying marijuana and cocaine to various distributors in California, Oklahoma,

---

matter of semantics") (quoting *United States v. Richerson*, 833 F.2d 1147, 1153 (5th Cir.1987)).

[7] *Id.* at 416 (quoting *Richerson*, 833 F.2d at 1154). In concluding that the nature of a criminal scheme evidenced a single conspiracy, the *Morris* court explained:

> If the sellers discontinued selling, there would be no cocaine for [the distributor] and the purchasers to buy. The necessity of a steady cocaine supply to feed a distribution effort is beyond question. Likewise, the distribution effort is critical to the success of the suppliers. If the purchasers ceased to buy, there would be no reason for [the distributor] to buy from the sellers, and hence no reason for the sellers to acquire the cocaine. Thus, although the sellers and the purchasers may not have had a direct relationship with each other, each was necessary for the continued success of the venture.

Id. (internal quotations and citations omitted).

[8] *Id.* (quoting *Richerson*, 833 F.2d at 1154).

Indiana, Florida, Colorado, New Mexico, and Texas. The evidence also establishes that appellant Gallegos helped Gonzalez and Gil in their efforts to supply narcotics to other appellants on several occasions. Other than a common source of supply, however, the evidence does not establish any interdependence between Gonzalez's and Gil's various distributors. Complicating our inquiry, moreover, is the fact that Gonzalez and Gil, the "key men" allegedly tying the conspiracy together, were fugitives from justice who were not present at trial. In any event, we pretermit a finding on the existence of a variance because even if one is assumed, we conclude that the appellants cannot establish that any variance that existed affected their substantial rights.

In *Kotteakos v. United States*, 328 U.S. at 766, 66 S.Ct. at 1248-49, the Supreme Court found that a group of defendants had been sufficiently prejudiced by a variance to justify reversal. In reaching its decision, the Court emphasized the size and complexity of the conspiracies involved. More important, however, the Court found that prejudice inhered in the trial because of "[t]he dangers of transference of guilt from one to another across the line separating conspiracies." *Id.* at 774, 66 S.Ct. at 1252. The Court concluded that "[i]n the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." *Id.* at 762, 66 S.Ct. at 1247.

This court has "long held that when the indictment alleges the conspiracy count as a single conspiracy, but the government proves multiple conspiracies and a

defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." *United States v. Faulkner*, 17 F.3d 745, 762 (5th Cir.), *cert. denied*, 513 U.S. 870, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994) (internal quotations and citations omitted). We have also pointed out, however, that we have never held this general rule to be absolute. *Id.* In this regard, we have acknowledged that such an absolute rule would be hard to square with *Kotteakos*. *Id.* at 765 n. 20, 66 S.Ct. at 1248 n. 20.

In *United States v. Faulkner*, we elaborated on the requisites of establishing a fatal variance in this circuit:

> [The] doctrine regarding variance between an indictment alleging a single conspiracy and proof of separate conspiracies is but one subset of the general concerns of improper joinder and severance. We therefore conclude that where the indictment alleges a single conspiracy and the evidence establishes each defendant's participation in at least one conspiracy[,] a defendant's substantial rights are affected only if the defendant can establish reversible error under general principles of joinder and severance.

Id. at 762 (footnote omitted). Thus, we look to the law of joinder and severance to determine whether the appellants' substantial rights were affected in this case.

In this regard, Rule 14 of the Federal Rules of Criminal Procedure provides that a court may order a severance "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together. . . . " FED. R. CRIM. P. 14. A denial of a motion for

severance is reviewed for an abuse of discretion. *Faulkner,* 17 F.3d at 759. To satisfy this standard of review, the defendant "bears the burden of showing specific and compelling prejudice that resulted in an unfair trial and such prejudice must be of a type against which the trial court was unable to afford protection." *Id.* (internal quotations and citations omitted). Any possibility of prejudice, moreover, must be balanced against the public's interest in the efficient administration of justice. *United States v. Hernandez,* 962 F.2d 1152, 1158 (5th Cir.1992). "The rule, rather than the exception, is that persons indicted together should be tried together, especially in conspiracy cases." *United States v. Pofahl,* 990 F.2d 1456, 1483 (5th Cir.), *cert. denied,* 510 U.S. 898, 114 S.Ct. 266, 126 L.Ed.2d 218 (1993).

A number of factors lead us to conclude that the appellants did not suffer specific and compelling prejudice resulting in a fatal variance. First, the evidence was sufficient to prove each appellant's participation in at least one conspiracy. *See* Part I, *supra; Faulkner,* 17 F.3d at 762. In addition, the district court's multiple conspiracy jury instruction safeguarded the appellants against the possibility of guilt transference.[9] This court has found

---

[9] The district court's instruction provided:

You are instructed that proof of several separate conspiracies is not proof of a single, overall conspiracy unless one of the several conspiracies which is proved is the conspiracy charged in Count One of the indictment. What you must do is determine whether the single conspiracy charged in Count One existed between two or more defendants. If you find no such conspiracy existed, then you must acquit all of the defendants as to that charge. However, if you are satisfied that the conspiracy

similar instructions sufficient to cure any possibility of prejudice in other cases. *See, e.g., Faulkner,* 17 F.3d at 759; *Guerra-Marez,* 928 F.2d at 672.

We are also persuaded that evidence exists that the jury was, in fact, able to follow the evidence and reach a fair and impartial verdict against each appellant. *See United States v. Diaz-Munoz,* 632 F.2d 1330, 1337 (5th Cir.1980) (recognizing that the inquiry regarding prejudice involves whether the jury can "keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him?"). Although the jury did not acquit any of the defendants at trial, it was unable to reach a verdict on two counts, which were eventually dismissed pursuant to Rule 29 of the Federal Rules of Criminal Procedure. *Cf. Faulkner,* 17 F.3d at 759. One of

---

alleged in Count One existed, you must determine who were the members of that conspiracy.

You are further instructed that proof of several separate conspiracies is not proof of a single, overall conspiracy unless one of the several conspiracies which is proved is the conspiracy charged in Count Eight of the indictment. What you must do is determine whether the single conspiracy charged in Count Eight existed between two or more defendants. If you find no such conspiracy existed, then you must acquit all of the defendants as to that charge. However, if you are satisfied that the conspiracy alleged in Count Eight existed, you must determine who were the members of that conspiracy.

If you find that a defendant was a member of another conspiracy, but not the one charged in Count One or the one charged in Count Eight of the indictment, then you must acquit that defendant as to that count. In other words, you must find that he or she was a member of the conspiracy charged in the indictment and not some other separate conspiracy.

the charges on which the jury hung was the money laundering charge against Gallegos under count eight of the indictment. The relevant evidence on this count included Madrid's testimony that he transferred a suitcase containing approximately $700,000 in drug proceeds to Gallegos in the presence of Gonzalez and Lied. Madrid testified that Gallegos saw the suitcase but "not necessarily" the money inside. Given this evidence, the jury's failure to reach a verdict on this count supports an inference that it was able to consider each defendant and each charge separately.

Finally, we note that the verdicts against the appellants in this case did not turn on particularly complex evidence that was likely to confuse the jury. The government implicated the appellants by relying almost exclusively on the direct testimony of co-conspirators and governmental informants. Such testimony was precise in establishing that each of the appellants knew of and participated in a drug conspiracy. While the appellants attempted to discredit the reliability of these witnesses at every stage of the proceedings, their strategy did not work. Instead, the jury chose to believe the government's witnesses and return guilty verdicts. There was no danger that the criminal acts of some would be carried over to the others because the culpability of each was clearly and distinctly proved. In circumstances such as these, when a pure credibility determination was at issue, we are not inclined to disturb a decision that was quite properly and directly within the jury's province.

III. Fourth Amendment Search

At trial, appellant Lloyd Phillip Maestas moved to suppress evidence attained during a February 27, 1994 search of his ranch in New Mexico because the material facts alleged in the affidavit for the search warrant were based on stale information. The district court found that the information upon which the affidavit was based indicated a long-standing, ongoing pattern of criminal activity. The district court, therefore, concluded that the warrant was supported by probable cause and denied Maestas's suppression motion. On appeal, Maestas contends that the district court's decision constituted reversible error.

This court engages in a two-step review of a district court's denial of a defendant's motion to suppress. *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir.1992). The first step requires the court to determine whether the good-faith exception to the exclusionary rule applies. *See United States v. Leon*, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 3420-21, 82 L.Ed.2d 677 (1984). The second step requires the court "to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed." *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332-33, 76 L.Ed.2d 527 (1983) (internal quotation omitted). If the good-faith exception applies, the court need not reach the question of probable cause. *Satterwhite*, 980 F.2d at 320; *see also United States v. Craig*, 861 F.2d 818, 820 (5th Cir.1988) ("Principles of judicial restraint and precedent dictate that, in most cases, we should not reach the probable cause issue if a decision on the admissibility of

the evidence under the good-faith exception of *Leon* will resolve the matter").[10]

In *Leon*, the Supreme Court established the good-faith exception, holding "that evidence obtained by law enforcement officials acting in objectively reasonable good-faith reliance upon a search warrant is admissible in the prosecution's case-in-chief, even though the affidavit on which the warrant was based was insufficient to establish probable cause." *Craig*, 861 F.2d at 821 (citing *Leon*, 468 U.S. at 922-23, 104 S.Ct. at 3420-21). "Issuance of a warrant by a magistrate normally suffices to establish good faith on the part of law enforcement officers who conduct a search pursuant to the warrant." *Id.* Law enforcement officers cannot establish objective good faith, however, when the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Id.* (quoting *Leon*, 468 U.S. at 923, 104 S.Ct. at 3420-21). *See, e.g., United States v. Jackson*, 818 F.2d 345, 350 & n. 8 (5th Cir.1987) (concluding that a "bare bones" affidavit did not justify good-faith reliance on a warrant); *United States v. Barrington*, 806 F.2d 529, 531-33 (5th Cir.1986) (same).

---

[10] We have indicated that "[t]he only instances in which this maxim should not be followed are those in which the resolution of a 'novel question of law . . . is necessary to guide future action by law enforcement officers and magistrates.' " *Craig*, 861 F.2d at 820-21 (quoting *Gates*, 462 U.S. at 264, 103 S.Ct. at 2346 (White, J., concurring)). Moreover, we recognized in *Craig* that "whether the facts alleged in the affidavit were so dated that they failed to establish probable cause at the time the warrant was issued" does not raise a novel question of law. *Id.* at 821.

To prevail on his fourth amendment claim, Maestas must establish that the facts alleged in the affidavit were so dated that no reasonable officer could have believed that the affidavit established probable cause to search his ranch. *Craig*, 861 F.2d at 822. In addressing a similar staleness claim in *United States v. Craig*, we explained:

> Two considerations have consistently appeared in this court's opinions on the issue of staleness. First, if the information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity, even if fairly long periods of time have lapsed between the information and the issuance of the warrant, the information need not be regarded as stale. Second, the nature of the evidence sought is also relevant. Courts are more tolerant of dated allegations if the evidence sought is of the sort that can reasonably be expected to be kept for long periods of time in the place to be searched.

Id. at 822-23 (internal quotations and citations omitted).

The affidavit in the instant case was not so lacking in indicia of probable cause as to render good-faith reliance on a warrant issued pursuant to it entirely unreasonable. The affidavit included information provided by Bowers that set forth the existence of a large-scale and ongoing drug-distribution enterprise. According to Bowers, Maestas's ranch was used by the organization as a distribution point for the shipment of marijuana and cocaine to California, Oklahoma, and Indiana. Bowers claimed that these drugs were transported in the hidden compartments of horse trailers, pickup trucks, and semi-tractors. Approximately six months prior to execution of the contested search warrant, Bowers accompanied federal

agents to New Mexico where he pointed out Maestas's ranch and identified several vehicles on the property that Bowers had used to transport drugs.

The affidavit also contained the contemporary observations of government agents that tended to corroborate the information provided by Bowers. Aerial surveillance of Maestas's ranch three days before the contested search produced photographs of several horse trailers and a semi-tractor that were consistent with vehicles described by Bowers. In addition, when Maestas was arrested the day before the contested search, the officers executing Maestas's arrest warrant observed in plain view a number of vehicles fitting Bowers's description. The officers also observed extra saddle fuel tanks (allegedly used by the organization to store contraband) in plain view on the property. Finally, on the day preceding the contested search, a related search of Gil's property produced a horse trailer with a false compartment that was registered to "Maestas Farms."

Maestas argues that the corroborative evidence gathered by the government contemporaneously with its application for a search warrant should be discarded because the evidence is consistent with the innocent activities of a legitimate rancher. This argument is unavailing. Both the Supreme Court and this circuit have recognized that "innocent behavior frequently will provide the basis for a showing of probable cause." *Gates*, 462 U.S. at 243 n. 13, 103 S.Ct. at 2335 n. 13; *see also United States v. Mendez*, 27 F.3d 126, 129 (5th Cir.1994). Taken together, the information provided by Bowers and the contemporary, corroborative evidence gathered by the government were sufficient for a reasonable officer to

believe that the challenged warrant was based on probable cause. Thus, the good-faith exception applies, and the district court did not err in denying Maestas's motion to suppress.

IV. Conclusion

We have considered the other points of error raised by the appellants and have concluded that they are without merit. First, Mendoza-Garcia's double jeopardy claim based on *Grady v. Corbin*, 495 U.S. 508, 510, 110 S.Ct. 2084, 2087, 109 L.Ed.2d 548 (1990), is rejected because *Grady* was overruled by *United States v. Dixon*, 509 U.S. 688, 703-04, 113 S.Ct. 2849, 2859-60, 125 L.Ed.2d 556 (1993).[11] Second, the appellants' contention that the district court's instructions to the jury impermissibly amended the indictment by broadening the charged offense from a conspiracy to possess with the intent to distribute "marijuana and cocaine" to a conspiracy to possess with the intent to distribute "marijuana or cocaine" is rejected. We have held that "a disjunctive statute may be pleaded conjunctively and proved disjunctively." *United States v. Johnson*, 87 F.3d 133, 136 n. 2 (5th Cir.1996) (quoting *United States v. Pigrum*, 922 F.2d 249, 253 (5th Cir.), *cert.*

---

[11] To prevail on his double jeopardy claim after *Dixon*, Mendoza-Garcia must establish that his conviction violates the same offense rule announced in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Mendoza-Garcia cannot make this showing. A long line of Supreme Court authority has established "the rule that a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States v. Felix*, 503 U.S. 378, 389, 112 S.Ct. 1377, 1384, 118 L.Ed.2d 25 (1992).

denied, 500 U.S. 936, 111 S.Ct. 2064, 114 L.Ed.2d 468 (1991) (internal quotations and citations omitted)). Finally, we have considered the arguments raised by the appellants challenging their Guideline-based sentences and have concluded that they also are without merit.

For the foregoing reasons, the convictions and sentences of the appellants are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50077

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MAXWELL GENE WALLACE: RUBEN GALLEGOS;

Defendant - Appellant

Appeals from the United States District Court for the Western District of Texas, El Paso

---

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion April 10, 1997, 5 Cir., F.3d)

(Filed May 22, 1997)

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestions for Rehearing En Banc as Petitions for Panel Rehearing, are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

( ) Treating the Suggestions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel

Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles R. Fulbruge, III
United States Circuit Judge

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * *

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Supreme Court Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court
>
> * * *

Federal Criminal Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Jury Instruction:
MULTIPLE CONSPIRACIES

You are instructed that proof of several separate conspiracies is not proof of a single, overall conspiracy unless one of the several conspiracies which is proved is the conspiracy charged in Count One of the indictment. What you must do is determine whether the single conspiracy charged in Count One existed between two or more defendants. If you find no such conspiracy existed, then you must acquit all of the defendants as to that charge. However, if you are satisfied that the conspiracy alleged in Count One existed, you must determine who were the members of that conspiracy.

You are further instructed that proof of several separate conspiracies is not proof of a single, overall conspiracy unless one of the several conspiracies which is proved is the conspiracy charged in Count Eight of the indictment. What you must do is determine whether the single conspiracy charged in Count Eight existed between two or more defendants. If you find no such conspiracy existed, then you must acquit all of the defendants as to that charge. However, if you are satisfied that the conspiracy alleged in Count Eight existed, you must determine who were the members of that conspiracy.

If you find that a defendant was a member of another conspiracy, but not the one charged in Count One or the one charged in Count Eight of the indictment, then you must acquit that defendant as to that count. In other words, to find a defendant guilty, you must find that he or she was a member of the conspiracy charged in the indictment and not some other, separate conspiracy.